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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 72-202

IN RE: DOUGLAS C. MacLEOD,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

Douglas C. MacLeod, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Missouri entered on April 10, 1972, in the cause entitled In re: Douglas C. MacLeod, No. 57030. A copy of the judgment is reproduced in Appendix B.

OPINION BELOW

An original proceeding for disciplinary action against petitioner was initiated in the Supreme Court of Missouri by the Advisory Committee of the Missouri Bar. After notice to petitioner, pleadings, briefs and oral argument, the Supreme Court of Missouri en banc rendered a decision

on April 10, 1972. The opinion is reproduced in Appendix A.

The decision of the Supreme Court of Missouri en banc is reported at 479 S. W. 2d 443.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on April 10, 1972 (See Appendix B). A timely motion for rehearing filed by petitioner was denied on May 8, 1972. A copy of the letter of the Clerk of the Supreme Court of Missouri advising of the overruling of petitioner's motion for rehearing is reproduced in Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I

Whether the Supreme Court of Missouri may discipline petitioner, an attorney at law, for conviction of the federal misdemeanor offense (under 26 U.S.C. § 7203) of failing to file federal income tax returns on the theory that it is a crime involving moral turpitude when the federal courts which tried petitioner and affirmed his conviction had determined as the law of the case that the crime did not involve moral turpitude.

II

Whether the misdemeanor of failure to file federal tax returns in violation of 26 U.S.C. § 7203 is a crime involving moral turpitude.

III

Whether the misdemeanor of failure to file federal tax returns in violation of 26 U.S.C. § 7203 is an appropriate basis for disciplinary proceedings against an attorney at law.

IV

Whether the imposition of disciplinary punishment on petitioner, an attorney at law, deprived him of constitutional rights to due process guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED

Amendments to Constitution of the United States

V

. . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . .

XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes of the United States

26 U.S. Code, § 7203. **Willful failure to file return, supply information, or pay tax.**

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by

law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Revised Statutes of Missouri, 1969

§ 484.190. **Powers to suspend or remove.**

Any attorney or counselor at law may be removed or suspended from practice in the courts of this state for any of the following reasons:

(1) If he be convicted of any criminal offense involving moral turpitude;

(2) If he unlawfully retain his client's money or if he is guilty of any malpractice, fraud, deceit or misdemeanor whatsoever in his professional capacity;

(3) If he shall have been removed, suspended or disbarred from the practice of law in any other state or jurisdiction and shall fail to disclose such fact in his application for license to practice law in this state.

§ 484.240. **Removal or suspension without trial.**

If the charge allege a conviction for any criminal offense involving moral turpitude, the court shall, on production of the record of such conviction, remove the attorney so convicted or suspend such attorney from practice for a limited time, according to the nature of the offense, as the court may deem just, and without further trial. If the attorney be acquitted or discharged upon his trial, or if he be charged under subdivision (1), (2) or (3) of section 484.190, and appears at the time fixed by court and denies the charges preferred against him, or having been notified as required by section 484.210 or 484.220, fails to appear, the court shall forthwith hear the evidence offered in sup-

port of said charge and the evidence offered by the accused, and shall determine the matter without delay. And if the court finds that the charge has been sustained, or if the accused shall admit that he is guilty, the court shall remove him from practice or shall suspend him for a limited period, according to the nature of the offense and as the court may deem just and proper.

Rules of Supreme Court of Missouri

Rule 4.47 General Rule Governing Certain Conduct of Lawyers.

A lawyer should always maintain his integrity; and shall not willfully commit any act against the interest of the public; nor shall he violate his duty to the courts or his clients; nor shall he, by any misconduct, commit any offense against the laws of Missouri or the United States of America, which amounts to a crime involving acts done by him contrary to justice, honesty, modesty or good morals; nor shall he be guilty of any other misconduct whereby, for the protection of the public and those charged with the administration of justice, he should no longer be entrusted with the duties and responsibilities belonging to the office of an attorney.

Rule 5.14 The Advisory Committee.

There is hereby established a committee to be composed of the General Chairman and four lawyers, who shall be appointed by the General Chairman, subject to the approval of this Court. One of the four lawyers is to serve for one year, one to serve for two years, one to serve for three years and one to serve for four years, and after each member's term expires his successor shall be appointed for a term of four years. This Committee shall be termed "The Advisory Committee." Each member shall take an oath that he will fairly and impartially and to the best of

his ability administer Rules 4, 5 and 6. The General Chairman of the Bar Committees shall be ex officio Chairman of the Advisory Committee.

Rules of United States District Court for the Eastern Judicial District of Missouri

Rule II(d) **Striking From Rolls.**

Any member of the bar of this court who is disbarred or suspended from practice by any court of record, or has voluntarily surrendered his license to practice, shall thereby forfeit his membership in the bar of this Court, and his name shall be stricken from the roll of attorneys unless within a time fixed by order of this court, and after notice of such order mailed by the clerk to the attorney at his address as shown upon the roll, he shall show that such disbarment, suspension or voluntary surrender of his license to practice, is no longer in effect.

STATEMENT

On August 2, 1947, petitioner was licensed to practice law in the State of Missouri. He practiced continuously thereafter and maintained offices in the City of St. Louis, Missouri.

On August 8, 1969, petitioner was indicted in the United States District Court for the Eastern District of Missouri, Eastern Division, for violation of Section 7203 of Title 26, United States Code. It was alleged in three counts that he failed to make income tax returns for the years 1963, 1964 and 1965. The offense is a misdemeanor.

Petitioner was tried by a jury in the District Court and was convicted. He was sentenced to imprisonment for a term of one year and a fine of $10,000.00 as to Count 1. He was placed on probation for five years as to Counts 2 and 3.

Petitioner appealed his conviction and it was affirmed by the United States Court of Appeals for the Eighth Circuit in **United States v. MacLeod,** 8 Cir., 436 F. 2d 947. Certiorari was denied by this Court, 402 U. S. 907, rehearing denied, 402 U. S. 990. Petitioner thereafter served his sentence in the United States Medical Center for Federal Prisoners at Springfield, Missouri, and was duly discharged. He also paid the fine imposed. He is presently on probation.

While petitioner was serving his sentence, these disciplinary proceedings were commenced by the Advisory Committee of the Missouri Bar. The Advisory Committee has been estalished by Rule 5 of the Rules of the Supreme Court of Missouri, particularly Rule 5.14.

The motion to remove petitioner from the roll of attorneys in the State of Missouri, a copy of which is repro-

duced in Appendix D, alleged that petitioner had been convicted as aforesaid and that, because a conviction of the misdemeanor of failure to file tax returns was a crime involving moral turpitude, petitioner was automatically subject to disbarment under § 484.240, R. S. Mo., 1969. The movants relied upon a decision of the Supreme Court of Missouri in **In re Burrus**, 258 S. W. 2d 625, holding that the failure to file federal income tax returns was a crime involving moral turpitude.

Petitioner through his counsel filed a response to the citation and motion for disciplinary proceedings, a copy of his response being reproduced in Appendix E. Petitioner admitted all factual allegations, but denied that he had been convicted of a crime involving moral turpitude, particularly in view of the refusal of the United States District Court at his original trial to instruct on the issue of moral turpitude. Petitioner pointed out that at the trial in the District Court he had requested but the Court had refused to give the following instruction:

> "The Court instructs the jury that you may not find the defendant guilty as to any count unless you find that the defendant acted as a result of his own moral turpitude, that is, as a result of baseness, vileness, or depravity in the private and social duties which according to the accepted standards of the time a man owes to his fellow man or to society in general."

Petitioner also alleged that the brief of the United States in opposition to his appeal to the United States Court of Appeals for the Eighth Circuit argued with reference to such instruction:

> "Instruction number 5 misstates the law and is quite misleading. Moral turpitude, or baseness, vileness or depravity are not required to be proven in this case. Wilfulness is the mens rea requirement,

and instruction number 5 is clearly incorrect and was properly refused."

Petitioner alleged that, inasmuch as the United States Court of Appeals for the Eighth Circuit affirmed his conviction and as his petition for certiorari was denied by this Court, "the law of the case" was established by the federal courts' interpretation of the federal statute and federal law, and the result was that he was not convicted of a crime involving moral turpitude. Therefore the Supreme Court of Missouri could not impose disciplinary action upon him for having been convicted of a crime involving moral turpitude; to do so would violate his Fifth and Fourteenth Amendment due process rights.

There were no factual disputes raised by the pleadings, and under the provisions of § 484.240, R. S. Mo. 1969, no trial was held.

After briefs and oral argument, the Supreme Court of Missouri en banc rejected petitioner's contentions and ordered that he "be suspended indefinitely from the practice of law with leave to apply for reinstatement after expiration of eighteen months from the date of rendition of this decision upon a showing that he is a person of good moral character and fully qualified to be licensed as a member of the Bar of Missouri." The Court's opinion refused to follow the law of the case as established by the federal courts, rejected petitioner's constitutional contentions, and declined to change the holding in the Burrus case, which petitioner contended was contrary to numerous decisions of other states; the Court held that as a matter of law petitioner had been convicted of a crime involving moral turpitude.

Thereafter petitioner filed a motion for rehearing before the Supreme Court of Missouri en banc. This motion was overruled without opinion on May 8, 1972. (See Appendix C.)

RAISING OF THE FEDERAL QUESTIONS

The first pleading filed by petitioner in the proceedings below was his response to citation and motion (Appendix E). After setting forth the basis of his contentions, petitioner stated (paragraph 10) "that a finding by this Court of moral turpitude as an essential element of the crime charged by 26 U. S. C., §7203 in this particular case would be an invasion of the federal prerogative in defining federal law and in interpreting a federal statute and would be contrary to 'the law of the case' as established by the federal courts." Petitioner also alleged (paragraph 11) "that to deprive him of the opportunity to engage in the practice of law will constitute a deprivation of his property without due process of law, contrary to the provisions of . . . the Fifth and Fourteenth Amendments to the Constitution of the United States."

The opinion of the Supreme Court of Missouri acknowledged the assertion of these federal constitutional issues. Although not specifically answered, the federal issues were rejected by the Supreme Court of Missouri.

REASONS FOR GRANTING THE WRIT

I

Whether the Supreme Court of Missouri May Discipline Petitioner, an Attorney at Law, for Conviction of the Federal Misdemeanor Offense (Under 26 U.S.C., §7203) of Failing to File Federal Income Tax Returns on the Theory That It Is a Crime Involving Moral Turpitude When the Federal Courts Which Tried Petitioner and Affirmed His Conviction Had Determined as the Law of the Case That the Crime Did Not Involve Moral Turpitude.

Petitioner was tried in the United States District Court for a violation of 26 U.S.C., §7203, which provides:

> "Any person . . . required by this title or by regulation made under authority thereof to make a return . . . who willfully fails to . . . make such return . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

At his trial, petitioner requested the following jury instruction:

> "The Court instructs the jury that you may not find the defendant guilty as to any count unless you find that the defendant acted as a result of his own moral turpitude, that is, as a result of baseness, vileness, or depravity in the private and social duties which according to the accepted standards of the time a man owes to his fellow man or to society in general."

This definition of moral turpitude conforms to the general law. It is patterned after the definitions set forth in

Black's and Bouvier's Law Dictionaries. An almost identical statement has been approved in Missouri. See **In re McNeese**, Mo. Sup. en banc, 142 S.W. 2d 33.[1]

The district trial judge refused to give the offered moral turpitude instruction. The United States Attorney argued successfully in the United States Court of Appeals for the Eighth Circuit that the refusal was proper:

> "Instruction number 5 misstates the law and is quite misleading. Moral turpitude, or baseness, vileness or depravity are not required to be proven in this case. Wilfulness is the mens rea requirement, and instruction number 5 is clearly incorrect and was properly refused."

Petitioner's conviction was affirmed by the Eighth Circuit in **United States v. MacLeod**, 436 F. 2d 947, and certiorari was denied by this Court, 402 U.S. 907, rehearing denied, 402 U.S. 990.

Thus, the federal courts have established that moral turpitude was not involved in the crime for which petitioner was convicted. Having so decided, the law of the case was determined as to petitioner's crime. Under principles declared by this Court, the state court should not be permitted to decide a federal question involving interpretation of a federal statute in a manner contrary to an earlier decision of federal courts on the same issue.

As early as 1825, this Court said in **Elmendorf v. Taylor**, 23 U.S. 152, 160:

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[1] If the Missouri disciplinary authorities were to adopt a standard of moral turpitude different from the above definition or were to impose disciplinary sanctions by statute for the specific crime here involved, the petitioner could not complain. Petitioner recognizes that the State of Missouri may adopt its own standards for the practice of law, but the discipline imposed here was not based on an adequate state standard. Instead it was founded on an erroneous interpretation of the federal law.

> "On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction."

The position was reiterated in 1867 in **Provident Institution for Savings v. Commonwealth of Massachusetts**, 73 U.S. 611, 628:

> "But the decisions of this Court in cases involving Federal questions, are conclusive authorities in the state courts."

The necessity of finality of decision of an issue is recognized in **Insurance Group Committee v. Denver & R.G. W.R. Co.**, 329 U.S. 607, 612:

> "While power rests in a federal court that passes an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review."

And as said in **United States v. United States Smelting Refining and Mining Co.**, 339 U.S. 186, 198:

> "The rule of law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter."

When the issue of moral turpitude was litigated and decided by the federal courts in petitioner's criminal trial and appeal, the matter should have ended and the courts of Missouri must be bound by the determination that petitioner was not convicted of a crime involving moral turpitude. The Supreme Court of Missouri really does not discuss this issue in its opinion. It merely states:

> "We do not agree that the decision in United States v. MacLeod, supra, ruled the question and

held as a matter of law that this offense did not involve moral turpitude. Furthermore, assuming for the purpose of discussion that it did so hold, we do not agree that that decision would represent the law of this case by which this court would be bound in determining whether the offense involved moral turpitude within the meaning of § 484.240 or our former Rule 4.47, V.A.M.R."

No authority is cited for this statement, and we suggest that none exists. Rather, the law is and ought to be that the courts of Missouri must give full effect to the decision by the federal courts that the crime involved here did not involve moral turpitude. As has been aptly stated in **Williams v. Columbia Gas & Electric Corp.**, D.C. Del., 27 F. Supp. 198, affirmed 110 F. 2d 15, cert. den. 310 U.S. 639:

> "The interpretation of a federal statute is federal business. Federal decisions construing an act of Congress must be exclusive and uniform."

The Missouri Court's refusal to follow the decisions of this Court and others in the federal system should be reviewed. Appropriate corrective action should be taken by this Court so as to bring the Missouri courts into harmony with the law of this case and the general law.

For these reasons, we respectfully submit that certiorari should be granted as to this question.

II

Whether the Misdemeanor of Failure to File Federal Tax Returns in Violation of 26 U.S.C., § 7203, Is a Crime Involving Moral Turpitude.

If, in the determination of Question No. 1 of this petition, this Court were to decide that the issue of moral turpitude has not already been decided in this case or

that the determination is not conclusive on the Supreme Court of Missouri, then there is another issue requiring resolution by this Court: is the failure to file a tax return, in violation of 26 U.S.C., § 7203, a crime involving moral turpitude.

There has been considerable discussion of the broad issue of intent required for conviction of tax crimes, but nothing definitive has been decided by this or any other court. Willfulness was discussed by this Court in **United States v. Murdock**, 290 U.S. 389, 394-396. Mens rea was further explained in **Spies v. United States**, 317 U.S. 492. In **Sansone v. United States**, 380 U.S. 343, this Court held that the proof of willfulness is the same for a felony or misdemeanor conviction. Various United States Courts of Appeals have also been confronted with the mens rea problems of failure to file cases. See the following as a few cases among the many which conflict over intent requirements: **United States v. Palermo**, 3 Cir., 259 F. 2d 872; **Haner v. United States**, 5 Cir., 315 F. 2d 792; **Lumetta v. United States**, 8 Cir., 362 F. 2d 644; **United States v. Schipani**, 2 Cir., 362 F. 2d 825; **United States v. Vitiello**, 3 Cir., 363 F. 2d 240; **Gennaro v. United States**, 8 Cir., 369 F. 2d 106; **United States v. Fahey**, 9 Cir., 411 F. 2d 1213, and **United States v. Matosky**, 7 Cir., 421 F. 2d 410.

But from these and other federal cases there has never emerged a clearcut, definitive explanation of the mens rea required for such an offense. Not only is this problem of concern to courts involved in determinations of the propriety of convictions under the tax laws, with the decisions seemingly being in hopeless conflict, but those cases affected by such problems, as in the disciplinary area, are also in hopeless conflict. See Question 3 of this petition.

It would be appropriate, therefore, for this Court to define the area of intent necessary for a prosecution under

Section 7203. In so doing, this Court must necessarily determine the relevance of the doctrine of moral turpitude. Any such discussion must also include a determination of the applicability of such cases as **Shevlin-Carpenter Co. v. Minnesota,** 218 U.S. 68; **United States v. Balint,** 258 U.S. 250; **United States v. Behrman,** 258 U.S. 280, and **United States v. Dotterweich,** 320 U.S. 277, which have been inferentially limited in **Morisette v. United States,** 342 U.S. 246, and **Lambert v. California,** 355 U.S. 255.

The conflict has been focused upon in an article by Professor Herbert L. Packer "Mens Rea and the Supreme Court", 1962 Sup. Ct. Rev. 107, and he suggests that the sanction of criminality and consequent imprisonment should be restricted to conduct involving moral turpitude or mens rea. This Court has cited the Packer article with approval, saying that the Court "has never articulated a general constitutional doctrine of mens rea". **Powell v. Texas,** 392 U.S. 514 (at fn. 27).

It would be appropriate now for this Court to articulate the general constitutional doctrine of mens rea. It would set at rest the conflict which exists among the authorities as to the mens rea requirements of federal tax prosecutions. It would also settle the tangential but crucial effect upon such cases as the instant one.

To determine this intent question with finality, we believe that it would be appropriate to grant certiorari as to this question.

III

Whether the Misdemeanor of Failure to File Federal Tax Returns in Violation of 26 U.S.C. §7203 Is an Appropriate Basis for Disciplinary Proceedings Against an Attorney at Law.

Section 484.190(1) of the Revised Statutes of Missouri, 1969, provides that an attorney may be removed or sus-

pended from practice "if he be convicted of any criminal offense involving moral turpitude." Section 484.240 provides for the automatic removal or suspension without trial merely upon production of the record of conviction of the offense involving moral turpitude. The statutes do not further define the term "criminal offense involving moral turpitude."

The Supreme Court of Missouri has held in several cases that the failure to file a federal income tax return, although a misdemeanor under federal law, is a crime involving moral turpitude, and that a conviction for such offense is ipso facto a sufficient basis for disciplinary sanctions against an attorney under Sections 484.190 and 484.240. See **In re Burrus**, Mo. Sup. en banc, 258 S.W. 2d 625; **In re McMullin**, Mo. Sup. en banc, 370 S.W. 2d 151, and **In re Lurkins**, Mo. Sup. en banc, 374 S.W. 2d 67.

The opinion of the Supreme Court of Missouri herein acknowledges that there is a conflict among the various states on this issue. It points out that "the courts have not crystallized the concept of 'moral turpitude' with a reasonable degree of certainty." (The Court below may have been correct in stating "that income tax evasion is reprehensible conduct and that it involves an intent to defraud", but it was obviously in error in attempting to make that statement applicable to the instant case because the charge here was a failure to file returns—there was no claim of tax evasion or intent to defraud.)

The conflict among the states is recognized by the Supreme Court of Missouri when it states: "The cases range from decisions which hold that it may not be inferred from the fact of conviction alone that moral turpitude is inherent in the crime and which require further showing that the particular conduct charged was infected with moral turpitude to those decisions which hold that mere conviction of an attorney for this offense is evidence of

conduct involving moral turpitude." The latter view has been adopted in Missouri.

Actually Missouri expresses the minority view among the states which have considered the problem. The subject is extensively discussed in an annotation at 59 A.L.R. 2d 1398. "State Court Disciplinary Action Against Attorney for Federal Income Tax Conviction."

Inasmuch as numerous states have taken a position directly contrary to that of Missouri, we respectfully submit that this conflict of opinions over the effect of a federal offense would be an appropriate area for review by this Court.

It may be argued that this is a matter for state courts to determine and that each state should be allowed to make its own determination as a matter of state law. We believe, however, that the subject cannot be lightly dismissed as just another state question. Some constitutional safeguards are required in the application of the amorphous phrase "moral turpitude." Cf. "Moral Turpitude as the Criterion of Offenses that Justify Disbarment," 24 Cal. L. Rev. 9.

The conflict of opinion is such that strange results would necessarily follow. It is common practice for other licensing jurisdictions generally to defer to the disciplinary findings of a state. Thus, the judgment of suspension against petitioner herein destroys his ability to practice in other states. Consider the anomaly of the State of Missouri, by adapting its own definition of moral turpitude to this particular federal offense, thereby causing petitioner to lose his right to continue to practice in the very same federal courts, including this Court, which have already concluded as a matter of law that there has not been a criminal offense involving moral turpitude. For example, Rule II(d) of the Rules of the United States District Court

for the Eastern Judicial District of Missouri (the district in which petitioner was tried and where the moral turpitude instruction was refused) provides that "any member of the bar of this Court who is disbarred or suspended from practice by any court of record . . . shall thereby forfeit his membership in the bar of this Court, and his name shall be stricken from the roll of attorneys . . ." Thus, the Federal District Court decided that petitioner was not guilty of a crime involving moral turpitude but must be bound by the contrary decision of the Supreme Court of Missouri and must strike petitioner's name from the District Court's roll of attorneys.

Because of the conflict which exists between various states and because of the effect that the decision of the Supreme Court of Missouri has upon the federal courts despite a contrary decision by the federal courts, we respectfully submit that certiorari should be granted as to this question.

IV

Whether the Imposition of Disciplinary Punishment on Petitioner, an Attorney at Law, Deprived Him of Constitutional Rights to Due Process Guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

Petitioner does not question the right of a state to establish guidelines for the conduct of members of its bar. Petitioner does assert, however, that such guidelines must exist within a constitutional framework. Otherwise, the established right to practice law and to earn a livelihood can be arbitrarily denied by unrestricted disciplinary proceedings. Without an adequate definition of the term "moral turpitude," the vague, amorphous phrase could be used as a sword to destroy exponents of unpopular causes.

We submit that, at the very least, due process of law requires that petitioner not be deprived of his property or his right to earn a livelihood, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, without appropriate standards for the imposition of such extreme sanctions. When a state refuses to recognize the application of the principles of moral turpitude as defined by the federal system and refuses to apply these principles to a case involving a federal statute interpreted by federal court decisions, the resultant disbarment or suspension from the practice of law constitutes such a constitutional deprivation.

For this reason, we respectfully submit that certiorari should be granted as to this question.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX A

In the Supreme Court of Missouri En Banc

In re: Douglas C. MacLeod — No. 57030

OPINION

(Filed April 10, 1972)

This is an original proceeding for disciplinary action filed in June, 1971, by the Advisory Committee, as informants, against Douglas C. MacLeod, a member of the bar of this court, as respondent.

Informants allege, in substance: (1) that respondent is, and has been since August, 1947, licensed to practice law in this state; (2) that in October, 1969, respondent was charged by a three-count indictment filed in the United States District Court for the Eastern District of Missouri with violation of the Internal Revenue Code of the United States[1] in that he failed to make an income tax return for each of the calendar years of 1963, 1964 and 1965;[2] (3) that respondent was tried by a jury and found guilty on all three counts; (4) that on January 5, 1970, respondent was sentenced by the trial judge to imprisonment for one year and fined $10,000.00 for the offense charged in Count I, but as to Counts II and III imposition of sentence was suspended and he was placed on probation for a period of five years, the probation to commence at the expiration of imprisonment imposed

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[1] 26 U.S.C.A. (I.R.C. 1954), § 7203.

[2] Count I charged that his gross income in 1963 was $35,133.56; Count II that his gross income in 1964 was $12,821.92; Count III that his gross income in 1965 was $18,143.53.

under Count I; (5) that the United States Court of Appeals for the Eighth Circuit affirmed the judgment of conviction and thereafter, in April, 1971, his petition for writ of certiorari was denied by the United States Supreme Court; (6) that pursuant to order of the court, respondent, in May, 1971, surrendered to serve and is now serving his sentence at the Medical Center for Federal Prisoners in Springfield, Missouri; (7) that the crime for which respondent was convicted involves moral turpitude and he should, therefore, be removed from the roll of attorneys licensed to practice law in this state and be disbarred as provided by § 484.240, RSMo 1969, V.A.M.S., and under the inherent power of this court to admit and remove persons from the practice of law in this state. A copy of the record of conviction has been filed with the court.

Respondent filed his response to the allegations of informants by which he admits the allegations of fact, but denies informants' conclusion that the offense of failing to file federal income tax returns involves moral turpitude. Respondent further alleges that failure to file income tax returns does not constitute "* * * an offense involving moral turpitude as a matter of law in this particular case." In support of this position he further alleges (1) that at his trial in district court he requested and the court refused to give the following instruction:

> "The Court instructs the jury that you may not find the defendant guilty as to any count unless you find that the defendant acted as a result of his own moral turpitude, that is, as a result of baseness, vileness, or depravity in the private and social duties which according to the accepted standards of the time a man owes to his fellow man or to society in general."

(2) that the position of the government in the appeal to the Court of Appeals, as evidenced by a statement con-

tained in its brief, was that respondent was not being tried for a crime involving moral turpitude, the statement being as follows:

> "Instruction number 5 misstates the law and is quite misleading. Moral turpitude, or baseness, vileness or depravity are not required to be proven in this case. Wilfulness is the mens rea requirement, and instruction number 5 is clearly incorrect and was properly refused."

Respondent further alleges that to deprive him of the opportunity to practice law will constitute a deprivation of his property without due process of law, contrary to the provisions of Article I, § 10, Constitution of Missouri, and the Fifth and Fourteenth Amendments to the Constitution of the United States.

After hearing oral arguments of counsel the case was taken as submitted on the pleadings and briefs of the parties. No contention is made by respondent that he was denied procedural due process in connection with any of the proceedings prior to submission.

As indicated, the main question presented is whether or not willfully and knowingly failing to make a federal income tax return is an offense involving moral turpitude. Informants contend that it is, citing cases[3] in which this court has so held. Respondent, recognizing these decisions, contends to the contrary and suggests that the court reexamine its position in the light of decisions of other jurisdictions.[4]

Respondent also contends, more specifically, that the United States Court of Appeals, in affirming his con-

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[3] In re Lurkins, Mo., 374 S.W.2d 67; In re McMullin, Mo., 370 S.W.2d 151; In re Burrus, Mo., 258 S.W.2d 625.

[4] For decisions from other jurisdictions he refers us to Annotation: State Court Disciplinary Action Against Attorney for Federal Income Tax Conviction, 59 A.L.R. 2d 1398.

viction,[5] declared that on the facts of this case moral turpitude is not involved; that the law of this case was thus established and this court is bound thereby and may not discipline him.

We do not agree that the decision in United States v. MacLeod, supra, ruled the question and held as a matter of law that this offense did not involve moral turpitude. Furthermore, assuming for the purpose of discussion that it did so hold, we do not agree that that decision would represent the law of this case by which this court would be bound in determining whether the offense involves moral turpitude within the meaning of § 484.240 or our former Rule 4.47, V.A.M.R.[6]

In reexamining our position, as suggested by respondent, "* * * in the light of decisions of other jurisdictions * * *", we find that those decisions were considered by the court in In re Burrus, and In re Lurkins, supra. It appears from those decisions that the courts have not crystallized the concept of "moral turpitude" with a reasonable degree of certainty, especially as it relates to the personal or professional life of a lawyer. The solution obviously does not lie in a definition, for examination of the cases demonstrates that from the same definition different views have resulted. All seem to agree, however, that income tax evasion is reprehensible conduct and that it involves an intent to defraud. The cases range from decisions which hold that it may not be inferred from the fact of conviction alone that moral turpitude is inherent in the crime and which require further showing that the particular conduct charged was infected with moral turpitude to those decisions which

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[5] United States v. MacLeod, 436 F.2d 947, cert. den., 91 S. Ct. 1378.

[6] Now Rule 4, DR 1-102, V.A.M.R.

hold that mere conviction of an attorney for this offense is evidence of conduct involving moral turpitude. This court has adopted the latter view. The court held in In re Burrus, supra, that an "* * * intentional failure to make returns as the law required constituted conduct involving moral turpitude within the meaning of both the statute, § 484.240 RSMo 1949, V.A.M.S., and our Rule 4.47." 258 S.W.2d at 627. In re Lurkins, 374 S.W.2d l.c. 68; In re McMullin, 370 S.W.2d l.c. 155. The question is well settled in this state and we are persuaded by our reexamination of the cases in other states that we should continue to maintain our present position.

Respondent should be disciplined. The limits to which that discipline should be extended have been given careful consideration. We are mindful that the purpose of these proceedings is not to punish, but rather to preserve the courts and the profession from the ministrations of those who, by their actions, degrade the administration of justice and demonstrate their unfitness to serve the courts as officers thereof. It is our judgment that an indefinite suspension will serve the ends of justice.

It is ordered that respondent be suspended indefinitely from the practice of law with leave to apply for reinstatement after expiration of eighteen months from the date of rendition of this decision upon a showing that he is a person of good moral character and fully qualified to be licensed as a member of the bar of Missouri.

All concur

FRED L. HENLEY, Judge

APPENDIX B

JUDGMENT

No. 57 030

In the Supreme Court of Missouri

January Session, 1972

In Re: Douglas C. MacLeod, Respondent.

Now at this day comes the Informants, by attorney, and the respondent, by attorney, and the Court here, having fully considered the Information filed herein, and the Answer of respondent, and having seen and considered the briefs and the oral arguments of counsel, being now sufficiently advised of and concerning the premises, doth conclude that respondent should be, and he is hereby, suspended indefinitely from the practice of law in this State with leave to apply for reinstatement to this Court after the expiration of eighteen months from the date of this order, upon a showing that he is a person of good moral character and fully qualified to be licensed as a member of The Missouri Bar.
(Opinion filed.)

State of Missouri—Set.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1972, and on the 10th day of April 1972, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 10th day of April 1972.

THOMAS F. SIMON, Clerk
.....D.C.

APPENDIX C

LETTER DENYING REHEARING

Clerk of the Supreme Court
State of Missouri
Jefferson City, Missouri

Thomas F. Simon
Clerk

65101

Telephone
636-8143

May 8, 1972

Mr. Leonard J. Frankel
Newmark and Baris
721 Olive Street
St. Louis, Missouri 63101

In re: Douglas MacLeod, Resp.—No. 57030

Dear Sir:

This is to advise the Court has this day issued the following order in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Yours very truly

THOMAS F. SIMON
Clerk

/GK

cc—

Mr. John E. Burruss, Jr., Attorney, Central Trust Building, Jefferson City, Missouri 65101

APPENDIX D

In the Supreme Court of Missouri
En Banc

May Session, 1971

In re: Douglas C. MacLeod 57030

CITATION

Whereas, It is presented to the Supreme Court of Missouri en banc, by Information and Motion of the Advisory Committee of the Missouri Bar Administration, a copy of which Information and Motion is hereto attached, that you, Douglas C. MacLeod, be removed from the roll of attorneys licensed to practice law in the State of Missouri and be disbarred as provided by Section 484.240 of the Revised Statutes of Missouri of 1969.

Now Therefore, you, the said Douglas C. MacLeod are hereby notified to show cause, if any you have, in the Supreme Court of Missouri on or before the 12th of July, 1971, why you should not be removed from the roll of attorneys licensed to practice law in Missouri and be disbarred as provided by Section 484.240 of the Revised Statutes of Missouri of 1969.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of Missouri this 22nd day of June, 1971.

MARION SPICER
Clerk of the Supreme Court of Missouri

(Seal)

In the Supreme Court of Missouri
En Banc

May Session, 1971

In re: Douglas C. MacLeod 57030

MOTION TO REMOVE SAID ATTORNEY
FROM THE ROLL OF ATTORNEYS
IN THE STATE OF MISSOURI

Come now Fred B. Hulse, Forrest M. Hemker, Clyde J. Linde, C. Wallace Walter and J. Andy Zenge, Jr. and state to the Court that they are the duly appointed, qualified and acting members of the Advisory Committee, created by Rule 5 of the rules of this Court, and are hereinafter termed "Informants."

Informants state that a license to practice law in the State of Missouri was issued to Douglas C. MacLeod by this Court on August 2, 1947 and since that time the said Douglas C. MacLeod has been duly licensed to practice law in this state.

Informants further state that on or about the 8th day of October, 1969, a grand jury in the United States District Court for the Eastern District of Missouri, Eastern Divison, returned an indictment in three Counts charging the said Douglas C. MacLeod with having violated the Internal Revenue Code of the United States by failing to make an income tax return for the calendar years of 1963, 1964 and 1965; thereafter the said Douglas C. MacLeod having entered a plea of not guilty was tried by a jury in the United States District Court for the Eastern District of Missouri, Eastern Division, and on December 11, 1969 a verdict of guilty was returned by said jury finding the defendant guilty of failing to file income tax re-

turns as required at the close of the calendar years of 1963, 1964 and 1965, in violation of Section 7203, Internal Revenue Code as charged in Counts 1, 2 and 3, respectively of said indictment; upon such conviction Honorable James H. Meredith, United States Judge for the Eastern District of Missouri, ordered the defendant committed to the custody of the Attorney General or his authorized representative for imprisonment of a period of one (1) year and punishment of defendant further fixed at a fine of ten thousand dollars ($10,000.00) to stand committed, defendant to be imprisoned until payment of aforesaid fine or until otherwise discharged as provided by law, as to and under the charge contained in Count 1 of said indictment, bond pending appeal fixed at the sum of $10,000.00; sentence as to and under the charge contained in each of Counts 2 and 3 the Court ordered suspension and the defendant placed on probation for a period of five years such probation to commence at the expiration of the term of imprisonment imposed under Count 1.

The Informants further state that the said Douglas C. MacLeod appealed his conviction and sentence in the United States District Court to the Eighth Circuit Court of Appeals where said conviction was affirmed by said Eighth United States Circuit Court of Appeals on January 25, 1971.

Informants further state that the said Douglas C. MacLeod then applied for a writ of certiorari to the Supreme Court of the United States and same was denied on or about the 19th day of April, 1971. The said Douglas C. MacLeod was then ordered to surrender himself to the custody of the United States Marshal for the Eastern District of Missouri in execution of the judgment and sentence imposed upon him within 30 days on or before the 30th day of May, 1971.

Informants further state that on or about the 17th day of May, 1971, Notice of Formal Hearing was sent to the

said Douglas C. MacLeod at his last known office address in the City of St. Louis by registered mail as required by the rules of this Court. Receipt of said formal notice was not acknowledged by the respondent attorney.

Informants further state that on or about the 28th day of May, 1971, the Advisory Committee met in session at Room 422 of the Mayfair Hotel in St. Louis, Missouri to hold said formal hearing aforesaid in accordance with the rules of this Court and that the said Douglas C. MacLeod failed to appear, the Committee being advised by the office of the United States Marshal for the Eastern District of Missouri that he had taken the said Douglas C. MacLeod to the federal prison in Springfield, Missouri during the week of May 24 to begin service of the prison sentence ordered in the final judgment in the case of United States of America, plaintiff v. Douglas MacLeod, defendant. Upon receipt of said information the Committee proceeded to make the record at said hearing in accordance therewith which record is herewith enclosed and contains as exhibits 1, 2 and 3 the indictment referred to herein, the judgment and commitment of the United States District Court and the judgment of the United States Court of Appeals for the Eighth Circuit.

Wherefore, Informants move the Court that the said Douglas C. MacLeod be removed from the roll of attorneys licensed to practice law in the State of Missouri and be disbarred as provided by Section 484.240 of the Revised Statutes of Missouri of 1969 because of the conviction of a crime involving moral turpitude, such crime having been held by this Court to involve moral turpitude in the case of in re: Burrus 258 S.W. (2d) 625, and under the inherent power of this Court to admit and remove persons from the practice of law in this state.

The Advisory Committee
/s/ FRED B. HULSE

APPENDIX E

In the Supreme Court of Missouri
En Banc

May Session, 1971

In re:
Douglas C. MacLeod } No. 57030

RESPONSE TO CITATION AND MOTION

Now comes Douglas C. MacLeod, Respondent, and files this response to the citation and motion to remove heretofore served upon him:

1. Respondent admits that informants are members of the Advisory Committee.

2. Respondent admits that he has been licensed to practice law in the State of Missouri and has practiced continuously since August 2, 1947.

3. Respondent admits that he was indicted on or about the 8th day of October, 1969, in the United States District Court for the Eastern District of Missouri, Eastern Division; that he pleaded not guilty; that on December 11, 1969, a jury returned a verdict of guilty; and that he was sentenced by the District Judge, all as alleged in informants' motion.

4. Respondent admits that he appealed to the United States Court of Appeals for the Eighth Circuit and that his conviction was affirmed.

5. Respondent admits that his petition for writ of certiorari was denied on the 19th day of April, 1971, that he was ordered to surrender to the United States Marshal, and that he has, in fact, surrendered, and is now serving

his sentence at the Medical Center for Federal Prisoners at Springfield, Missouri.

6. Respondent does not deny that a notice of formal hearing was mailed to him, as alleged in informants' motion.

7. Respondent does not deny that the Advisory Committee met on the 28th day of May, 1971.

8. Respondent admits each and every other allegation of fact contained in informants' motion.

9. Nevertheless, Respondent takes issue with the conclusion of law stated in the final paragraph of informants' motion that violation of 26 U.S.C. § 7203 for failure to file income tax returns constitutes an offense involving moral turpitude as a matter of law in this particular case.

In support of his position, Respondent offers the following:

A. During Respondent's trial in the United States District Court, he requested that the following instruction be given to the jury:

> "The Court instructs the jury that you may not find the defendant guilty as to any count unless you find that the defendant acted as a result of his own moral turpitude, that is, as a result of baseness, vileness, or depravity in the private and social duties which according to the accepted standards of the time a man owes to his fellow man or to society in general."

(The definition of "moral turpitude" is patterned after that of Black and Bouvier and is almost identical with that in **In re McNeese**, Mo. Sup., 142 S. W. 2d 33.)

B. The trial Judge refused to give such instruction.

C. The brief of the United States, filed in connection with Respondent's appeal to the United States Court of Appeals for the Eighth Circuit, contained the following statement with reference to the aforesaid instruction:

> "Instruction number 5 misstates the law and is quite misleading. Moral turpitude, or baseness, vileness or depravity are not required to be proven in this case. Wilfulness is the mens rea requirement, and instruction number 5 is clearly incorrect and was properly refused."

D. The United States Court of Appeals affirmed Respondent's conviction, and Respondent's petition for certiorari was denied by the United States Supreme Court.

E. The position of the United States government in prosecuting Respondent, and sustained by the federal courts, was therefore that Respondent was not being tried for a crime involving moral turpitude.

F. Despite what informants contend the law to be (whether or not **In re Burrus**, 258 S. W. 2d 625, so holds, and if it does so hold, whether or not it is a correct statement of the law), it is Respondent's contention that the facts of this particular case as aforesaid show as a matter of law that Respondent was not convicted of a crime involving moral turpitude.

10. Respondent further states that a finding by this Court of moral turpitude as an essential element of the crime charged by 26 U. S. C. § 7203 in this particular case would be an invasion of the federal prerogative in defining federal law and in interpreting a federal statute and would be contrary to "the law of the case" as established by the federal courts.

11. Respondent further states that to deprive him of the opportunity to engage in the practice of law will con-

stitute a deprivation of his property without due process of law, contrary to the provisions of Article I, Section 10 of the Constitution of the State of Missouri and the Fifth and Fourteenth Amendments to the Constitution of the United States.

12. Respondent respectfully suggests that, under the law of this particular case, the provisions of §§ 484.190 and 484.240, V.A.M.S., are not applicable and Respondent should be discharged herein.

Wherefore, Respondent prays that the citation and motion herein be dismissed and that he be discharged.

NEWMARK and BARIS
By IRL B. BARIS
Attorneys for Respondent
721 Olive Street
St. Louis, Missouri 63101
621-7400

[redacted]

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 72-202

IN RE: DOUGLAS C. MacLEOD,
Petitioner.

RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to Rule 40, for purposes of the Petition for Review, the Advisory Committee of the Missouri Bar Administration, Respondents, will make no additional statement of the case, and will also accept as satisfactory the Petitioner's presentations of the opinion below, the jurisdictional statement, and the constitutional and statutory provisions and rule of court involved in the case. We shall include herewith some additional appendix material, and we do not agree with the Petitioner's statement of the questions presented for review. In our viewpoint, the question is as follows:

QUESTION PRESENTED

Whether the Petitioner Was Denied His Constitutional Right to Due Process of Law When the Supreme Court of Missouri, Pursuant to the Statute, Its Own Supplementary Rule, and Its Long Standing Line of Decisions, Disciplined Him by Reason of His Federal Conviction of Willfully Failing to File Income Tax Returns.

ARGUMENT

A. Preliminary.

The petitioner has made no contention in his petition that the Missouri disciplinary proceeding which culminated in his suspension was lacking in procedural due process of law. Neither has he contended that, in comparison with prior Missouri disciplinary proceedings involving other attorneys, he has been dealt with harshly, unequally, or discriminatorily. As we interpret the footnote on page 13 of the within Petition, he concedes that, under a properly worded statute or supreme court rule (or both), the State of Missouri would have the constitutional authority to suspend from the practice of law in Missouri an attorney convicted, as he was, of violating 26 U.S.C., § 7203, relating to willful failure to file federal income tax returns. Thus, the issue is narrowed to the question of the constitutional validity of the petitioner's suspension under existing statutes, rules, and decisions.

B. The Federal Criminal Case Did Not Establish Lack of Moral Turpitude.

Basically, the petitioner's contentions (in Section I, p. 12, *et seq.*) are that he has not been convicted of an offense involving moral turpitude within the meaning of the disciplinary statute and rules of the State of Missouri. His first argument is that the criminal case against him established, as the "law of the case," that he was not guilty of an offense involving moral turpitude. We contend that the criminal conviction did not establish either the absence or the presence of that category of criminal conduct.

The petitioner develops his point in this manner: (1) In the criminal proceeding, he offered an instruction to

the effect that the jury could not convict unless it found that he acted as a result of his own moral turpitude; (2) that such instruction was refused by the trial judge; (3) that he contended on appeal that the refusal to give the instruction was erroneous; (4) that the U. S. Attorney argued on appeal that the offense did **not** involve moral turpitude; (5) that the appellate court did not reverse the conviction; (6) therefore the "law of the case" was established that there was no moral turpitude.

The fallacy of this line of argument is that "moral turpitude", as a label or element, is not referred to in either the statute or the indictment under which petitioner was convicted. The statute provides that:

> "Any person . . . who willfully fails to . . . make such [income tax] return . . . shall . . . be guilty of a misdemeanor and . . . shall be fined . . . or imprisoned . . ." (26 U.S.C., § 7203).

Under the statute, the quality of misconduct which leads to a conviction is **willfulness.** Whether the term "willfully" is the same as, equivalent to, or different from the quality known as "moral turpitude" does not matter for purposes of the statutory definition of the offense.

The jury, in petitioner's tax trial, was instructed that:

> "The word 'willful' as used in the statute . . . means voluntary, purposeful, deliberate, and with the specific intent to do that which the law forbids, as distinguished from accidental, inadvertant or negligent . . . On the other hand, if his act was done with bad purpose either to disobey or disregard the law then his act was willful." (App. A)

The petitioner has correctly indicated that the federal courts have agonized considerably as to the element of willfulness and intent in tax prosecutions (Petn. p. 16).

But no federal court (that we can find, or that petitioner has cited) has passed upon the term willfullness in these tax cases in terms of moral turpitude or the lack thereof; the obvious reason being that any such question would have been entirely extraneous for purposes of determining guilt or innocence. But the petitioner would have injected that precise alien element into this case if his instruction hypothesizing moral turpitude had been superimposed upon the court's above-quoted description of willfulness as that term was used in the statute.

The petitioner contends that the appellate affirmance of the conviction constituted a holding that he was not guilty of moral turpitude; particularly in view of a statement by the U. S. Attorney in his brief that "Moral turpitude, or baseness, vileness or depravity are not required to be proven in this case" (Petn. p. 13). A fair reading of the appellate opinion (**U. S. v. MacLeod**, 436 F. (2d) 947, 8 Cir., 1971; cert. den. 402 U.S. 907, 990) will disclose the error of petitioner's contention. The U. S. Attorney was not contending in his brief that the quality of Mr. MacLeod's conduct did not rise (or descend) to the level of malevolance of moral turpitude, or that moral turpitude was of the same or a different scale or dimension of misbehavior. Rather, he was saying, as we do here, that that question was not a factor in the case. He stated succinctly that "willfulness is the mens rea requirement" of the statute—no more no less. (See App. B.)

The Eighth Circuit opinion did not mention the moral turpitude issue at all. It reviewed all the instructions which were given, and found them to be fair and appropriate. (**U. S. v. MacLeod**, *supra*, l.c. 950.) By implication, it approved the trial court's rejection of the petitioner's "moral turpitude" instruction. It affirmed the conviction. The most that can be said of the decision is that the Circuit Court did not rule on whether the offense involved moral turpitude, or whether it did not. The Supreme

Court denied certiorari. (See **MacLeod v. U. S.**, 402 U.S. 907, 990.)

We therefore submit that the petitioner's major premise is without support when he contends that the law of the criminal case is that his offense did not involve moral turpitude.

C. **The Instant Disciplinary Proceeding Is Altogether Separate and Distinct From the Criminal Case.**

The criminal case and this disciplinary case are entirely separate proceedings, before different tribunals, involving vastly different issues. The criminal case was concerned with whether petitioner, as a person (a potential taxpayer) willfully failed to make and file tax returns. This case relates to his fitness (or lack thereof) to continue as an officer of the court in a role embodying ethical standards immensely higher than the mere freedom from criminal intent and conduct.

Although professional disciplinary sanctions involve a type of punishment or penalty (**Spevack v. Klein**, 385 U. S. 511, 1967), their ultimate purpose is to protect the public, and ". . . for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them" (**Ex parte Wall**, 107 U.S. 265, l. c. 288, 1882; See also **In Re Ruffalo**, 390 U.S. 544, 1968).

In the instant case, the Missouri Supreme Court, consistent with a long-standing policy, stated that:

> "We are mindful that the purpose of these proceedings is not to punish, but rather to preserve the courts and the profession from the ministrations of those who, by their actions, degrade the administration of justice and demonstrate their unfitness to serve the courts or officers thereof" (App. C. penultimate para-

graph; See also **In Re Randolph**, 347 S.W. (2d) 91, Mo. 1961, Cert. Den. 368 U.S. 916).

Since the two proceedings are so vastly different in nature and purpose, the disciplinary tribunal is charged with the duty, and also is vested with authority, to draw its own reasonable inferences from the fact of the petitioner's conviction of violation of the subject tax statute.

D. For Purpose of Regulating the Practice of Law, the Missouri Supreme Court Validly and Properly Treated Petitioner's Federal Conviction as Grounds for Disciplinary Action.

The petitioner asks the Court, in this disciplinary case, to declare a rule of law authoritatively defining the mens rea characteristics of federal income tax offenses, in terms of moral turpitude. Then he would transpose that raw criminal definition into the field of professional discipline. He seems to contend that moral turpitude should mean the same in disciplinary cases as it does in criminal cases, and that it should mean the same in every State which uses such phrase in its disciplinary code, particularly in connection with tax offenses. He argues, further, that there is no uniformity of view among the states with respect to the disciplinary significance of this type of misconduct, therefore to attain uniformity nationwide, there is a constitutional basis for review (See Petn. Sections II and III, p 15, *et seq.*).

In the first place, we do not agree that there is really the divergence of view among the States with respect to these tax offenses as is indicated by the petitioner. Of the cases mentioned in the A.L.R. article cited by the petitioner (59 A.L.R. (2d) 1398, Petn. p. 19), in States categorized as viewing tax convictions as not necessarily involving moral turpitude, all the convicted attorneys were

disciplined in one way and form or another, except three. Of the three not disciplined in the first instance, one's case was sent back for further investigation,[1] one's was dismissed with no discipline because the court did not look upon a plea of *nolo contendre* as the equivalent of a conviction of the tax offense,[2] and one's was dismissed outright because the state court apparently had no sympathy with a "net worth" type of prosecution.[3]

Secondly, as we shall demonstrate, there is no **constitutional** rule requiring uniformity among the states in disciplinary matters in any event.

This Court has never been prone (nor shown any desire) to substitute its judgment for the historical and traditional right of the highest courts of the States to regulate the practice of law in their jurisdictions—within constitutional bounds, of course.

> "That the states have broad powers to regulate the practice of law is, of course, beyond question." **(Mine Workers v. Ill. Bar Assn.**, 389 U.S. 217, l.c. 222, 1967)

> "It is not for this Court, except within the narrow limits for review open to this Court . . . to sit in judgment to Louisiana disbarments . . ." **(Thread v. U.S.**, 354 U.S. 278, l.c. 281, 1957)

Also,

> "Virginia undoubtedly has broad powers to regulate the practice of law within its borders; but we have had occasion in the past to recognize that in regulating the practice of law a State cannot ignore

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[1] **Re Hallinan**, 272 P.(2d) 768, Calif. 1954; Hallinan suspended for 3 years see 307 P.(2d) 1, Calif. 1957.

[2] **La. State Bar v. Connolly**, 20 So.(2d) 168, La., 1944.

[3] **Ky. State Bar v. Brown**, 302 S.W. (2d) 834, Ky. 1957.

the rights of individuals secured by the Constitution." (**Railroad Trainmen v. Virginia Bar**, 377 U.S. 1, l.c. 6, 1964; and see also **Konigsberg v. State Bar**, 353 U.S. 252, l.c. 273, 1957)

Only in instances where intervention is necessary to protect profound constitutional rights does this Court grant review. In the first **Konigsberg** case (353 U.S. 252), for example, the Court would not permit a state examining authority to intrude upon an applicant's freedoms of political expression and association. But, in the Second **Konigsberg** case (**Konigsberg v. State Bar**, 366 U.S. 36, 1961), the Court held that Konigsberg could be denied admission unless he answered questions relative to membership in the Communist party, which he had contended was a constitutional right of free speech and association. In **N.A.A.C.P. v. Button**, 371 U.S. 415, 1963, the Court recognized the States' traditional right to regulate the legal profession, but pointed out that federal limitations upon that right are appropriate when necessary to protect overriding constitutional rights of individuals; particularly in the absence of a showing of ". . . substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibition which it [the State] has imposed." (**N.A.A.C.P. v. Button**, *supra*, l.c. 444.) To the same effect, see **Railroad Trainmen v. Virginia Bar**, *supra*, l.c. 7-8).

As we interpret these and other decisions, this Court takes the position that it will not descend into a review of the policies of the State authorities in the field of professional discipline, so long as there is no clear deprivation of profound constitutional rights and so long as such policies bear some rational relationship to fitness or ability to practice law and are not discriminatory or arbitrary. (See **Schware v. Board of Bar Examiners**, 353 U.S. 232, 1957.)

This policy then recognizes the fact that there is no constitutional rule of uniformity throughout the nation, and indeed we submit that it leaves room for non-uniformity, except as noted above. As a matter of fact, this Court has recognized, and indeed held, that there is no requirement of complete harmony between the federal and the state courts in the field of professional discipline. Sixty years ago, in **Selling v. Radford**, 243 U.S. 46, 1917, it held that a disbarment by a State court would not necessarily be a basis for disbarment by this Court of the same lawyer for precisely the same misconduct. (See also **In Re Isserman**, 345 U.S. 286 (1953), and Rule 8, Supreme Court of the United States.) This doctrine was extended to the lower federal courts in **Thread v. United States**, *supra*, with the suggestion (as we interpret the comment) that perhaps the lower federal court would or might be justified in **not** going along with a State disbarment of a lawyer (l.c. 282).

In the area of moral turpitude as a basis for disciplinary action, so far as we can determine, this Court has deemed the phrase "good moral character" to mean the absence of moral turpitude, but in doing so, it looked to the State court for the definition of the phrase. (**Konigsberg v. State Bar**, 353 U.S. 252, supra, at page 263.) In **Schware v. Board of Bar Examiners**, *supra*, this Court specifically took note of the divergent views between some of the States as to the meaning and implications of moral turpitude (l.c. 243, footnote 11).

So we submit that uniformity among the States is not a constitutional requirement, and this is particularly true in the area of moral turpitude where the disciplinary authorities must exercise reasoned and mature ethical judgment and discretion.

E. Missouri acted reasonably and appropriately.

If it is within the area of competence of the Missouri Supreme Court to make the disciplinary determinations with respect to the implications of the convictions of its lawyers for tax offenses, as we believe we have established, then its disposition of the petitioner's case, and others precisely like it, was reasonable and appropriate.

At the time of the petitioner's conviction, there were three basic sources of Missouri law which bore upon the disciplinary aspects of such conviction. Section 484.190 (R.S.Mo.) empowered the Court to remove or suspend a lawyer "(1) If he be convicted of any criminal offense involving moral turpitude" (See App. D). Also, the Canon of Ethics, promulgated by the Supreme Court of Missouri, by virtue of its inherent power to regulate the bar of the state,[4] provided that a lawyer should not:

> ". . . by any misconduct, commit any offense against the laws of Missouri or the United States of America, which amounts to a crime involving acts done by him contrary to justice, honesty, modesty, or good morals . . ." (Rule 4.47, App. E).

Over the years, on a case by case basis, the Missouri Supreme Court has developed a definition of moral turpitude which more or less combines a dictionary definition with the above-quoted court rule, as follows:

> " 'Moral turpitude is an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything done contrary to justice, honesty, modesty, and good morals' " (**In Re McNeese**, 142 S.W. (2d) 33-4, Mo., 1940).

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[4] See **Neibling v. Terry**, 177 S.W. (2d) 502, Mo., 1944.

From these two general sources of basic authority, the Missouri Supreme Court then took up the disciplinary import of tax convictions of lawyers, and specifically the "failure to file" cases. In 1953, in **In Re Burrus**, 258 S.W. (2d) 625, Mo., 1953, the Court clearly and explicitly held:

> "We think it quite clear and, accordingly, hold that his intentional failure to make returns as the law required constituted conduct involving moral turpitude within the meaning of both the statute . . . and our rule . . ." (l.c. 627).

Since that case, without deviation, the Missouri Court has expressly adhered to the same position **(In Re McMullin**, 370 S.W. (2d) 151, Mo., 1953, **In Re Lurkins**, 374 S.W. (2d) 67, Mo., 1964), and in the instant case it again reexamined and reiterated its position. (App. C).

When the highest court of a State expressly and authoritively construes a State statute (and *a fortiori,* its own rule), such construction becomes the law of such State. **(N.A.A.C.P. v. Button**, *supra*, see page 432) Here, we have the explicit, unswerving construction of the meaning of "moral turpitude" by the Missouri Supreme Court in the context of federal convictions for failure to file tax returns. There is no basis for the petitioner to contend (as he seems to do on page 20 of his petition) that there is not an adequate definition of moral turpitude or that the term is vague or uncertain. The law of Missouri was made explicit in the **Burrus** case some ten years before he committed the offense of which he was convicted. The law has been applied **uniformly** and has not and cannot be used as a sword to destroy exponents of unpopular causes as the petitioner suggests. (See Petn. p. 20)

The petitioner refers to the extra-territorial and extra-jurisdictional reach of the Missouri suspension order.

(Petn. pp. 19-20) The **Selling**, **Isserman**, and **Thread** cases, cited above, ruled that federal courts are free to and must in fact make their own intrinsic examinations of the quality of any alleged misconduct in cases coming before them based upon state disbarments. The several states, as we indicated above, have their individual professional standards of conduct against which any lawyer's conduct must be judged.

CONCLUSION

We respectfully submit that the petitioner has not been denied any constitutionally secured right, and that his petition should be denied.

Dated, at St. Louis, Missouri, this 28th day of September, 1972.

HAROLD W. BARRICK
FORREST M. HEMKER
CLYDE J. LINDE
C. WALLACE WALTER
J ANDY ZENGE, JR.
The Members of the Advisory Committee of the Missouri Bar Administration
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APPENDIX

APPENDIX A

Portion of
Trial Court's Jury Instruction

U.S. v. MacLeod, E.D. Mo., 1969

"The word 'willful' as used in the statute involved in this case means voluntary, purposeful, deliberate, and with the specific intent to do that which the law forbids, as distinguished from accidental, inadvertent or negligent. The requirement that failure to make and file the returns in question be done willfully exists so that the accused will not be convicted of failing to make or file such returns because of mistake or inadvertence. If the jury believes that the defendant acted with negligence, inadvertence, mistake, or due to his good faith misunderstanding of the requirements of the law, his act was not willful. On the other hand, if his act was done with bad purpose either to disobey or disregard the law then his act was willful. In this connection you are instructed that the only bad purpose or evil motive which the Government must prove in this case is the deliberate intention not to file a return which the defendant knew the law required him to file so that the Government would not know the extent of his liability."

APPENDIX B

Excerpt From U.S. Attorney's Brief (p. 21)

Filed in
U.S. v. MacLeod
U.S. Circuit Court of Appeals for the Eighth Circuit

No. 20,106

"Instruction number 5 misstates the law and is quite misleading. Moral turpitude, or baseness, vileness or depravity are not required to be proven in this case. Wilfulness is the mens rea requirement, and instruction number 5 is clearly incorrect and was properly refused. The duties of the trial court as to instructions has been stated by this Court as follows:

> '. . . a trial judge, in formulating his charge, is entitled to use his own language and is not required to let counsel for either party put words into his mouth. If the charge is accurate and gives to the jury all of the law which it needs in order to reach a verdict, that is enough. A charge should be a concise statement of the claims of the parties, the issues of fact which the jury must decide, and the applicable law. It should not be a compilation of miscellaneous requested instructions'."

APPENDIX C

IN THE SUPREME COURT OF MISSOURI EN BANC

479 S.W. (2d) 443, Mo. 1972

In re: Douglas C. MacLeod — No. 57030

This is an original proceeding for disciplinary action filed in June, 1971, by the Advisory Committee, as informants, against Douglas C. MacLeod, a member of the bar of this court, as respondent.

Informants allege, in substance: (1) that respondent is, and has been since August, 1947, licensed to practice law in this state; (2) that in October, 1969, respondent was charged by a three-count indictment filed in the United States District Court for the Eastern District of Missouri with violation of the Internal Revenue Code of the United States[1] in that he failed to make an income tax return for each of the calendar years of 1963, 1964 and 1965[2]; (3) that respondent was tried by a jury and found guilty on all three counts; (4) that on January 5, 1970, respondent was sentenced by the trial judge to imprisonment for one year and fined $10,000.00 for the offense charged in Count I, but as to Counts II and III imposition of sentence was suspended and he was placed on probation for a period of five years, the probation to commence at the expiration of imprisonment imposed under Count I; (5) that the United States Court of Appeals for the Eighth Circuit affirmed the judgment of conviction and thereafter, in April, 1971,

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[1] 26 U.S.C.A. (I.R.C. 1954), § 7203.

[2] Count I charged that his gross income in 1963 was $35,133.56; Count II that his gross income in 1964 was $12,821.92; Count III that his gross income in 1965 was $18,143.53.

his petition for writ of certiorari was denied by the United States Supreme Court; (6) that pursuant to order of the court, respondent, in May, 1971, surrendered to serve and is now serving his sentence at the Medical Center for Federal Prisoners in Springfield, Missouri; (7) that the crime for which respondent was convicted involves moral turpitude and he should, therefore, be removed from the roll of attorneys licensed to practice law in this state and be disbarred as provided by § 484.240, RSMo. 1969, V.A.M.S., and under the inherent power of this court to admit and remove persons from the practice of law in this state. A copy of the record of conviction has been filed with the court.

Respondent filed his response to the allegations of informants by which he admits the allegations of fact, but denies informants' conclusion that the offense of failing to file federal income tax returns involves moral turpitude. Respondent further alleges that failure to file income tax returns does not constitute "• • • an offense involving moral turpitude as a matter of law in this particular case." In support of this position he further alleges (1) that at his trial in district court he requested and the court refused to give the following instruction:

> "The Court instructs the jury that you may not find the defendant guilty as to any count unless you find that the defendant acted as a result of his own moral turpitude, that is, as a result of baseness, vileness, or depravity in the private and social duties which according to the accepted standards of the time a man owes to his fellow man or to society in general."

(2) that the position of the government in the appeal to the Court of Appeals, as evidenced by a statement contained in its brief, was that respondent was not being tried for a crime involving moral turpitude, the statement being as follows:

"Instruction number 5 misstates the law and is quite misleading. Moral turpitude, or baseness, vileness or depravity are not required to be proven in this case. Wilfulness is the mens rea requirement, and instruction number 5 is clearly incorrect and was properly refused."

Respondent further alleges that to deprive him of the opportunity to practice law will constitute a deprivation of his property without due process of law, contrary to the provisions of Article I, § 10, Constitution of Missouri, and the Fifth and Fourteenth Amendments to the Constitution of the United States.

After hearing oral arguments of counsel the case was taken as submitted on the pleadings and briefs of the parties. No contention is made by respondent that he was denied procedural due process in connection with any of the proceedings prior to submission.

As indicated, the main question presented is whether or not willfully and knowingly failing to make a federal income tax return is an offense involving moral turpitude. Informants contend that it is, citing cases[3] in which this court has so held. Respondent, recognizing these decisions, contends to the contrary and suggests that the court reexamine its position in the light of decisions of other jurisdictions.[4]

Respondent also contends, more specifically, that the United States Court of Appeals, in affirming his conviction,[5] declared that on the facts of this case moral turpi-

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[3] In re Lurkins, Mo., 374 S.W.2d 67; In re McMullin, Mo., 370 S.W.2d 151; In re Burrus, Mo., 258 S.W.2d 625.

[4] For decisions from other jurisdictions he refers us to Annotation: State Court Disciplinary Action against Attorney for Federal Income Tax Conviction, 59 A.L.R. 2d 1398.

[5] United States v. MacLeod, 436 F.2d 947, cert. den., 91 S. Ct. 1378.

tude is not involved; that the law of this case was thus established and this court is bound thereby and may not discipline him.

We do not agree that the decision in United States v. MacLeod, supra, ruled the question and held as a matter of law that this offense did not involve moral turpitude. Furthermore, assuming for the purpose of discussion that it did so hold, we do not agree that that decision would represent the law of this case by which this court would be bound in determining whether the offense involves moral turpitude within the meaning of § 484.240 or our former Rule 4.47, V.A.M.R.[6]

In reexamining our position, as suggested by respondent, "• • • in the light of decisions of other jurisdictions • • •", we find that those decisions were considered by the court in In re Burrus, and In re Lurkins, supra. It appears from those decisions that the courts have not crystallized the concept of "moral turpitude" with a reasonable degree of certainty, especially as it relates to the personal or professional life of a lawyer. The solution obviously does not lie in a definition, for examination of the cases demonstrates that from the same definition different views have resulted. All seem to agree, however, that income tax evasion is reprehensible conduct and that it involves an intent to defraud. The cases range from decisions which hold that it may not be inferred from the fact of conviction alone that moral turpitude is inherent in the crime and which require further showing that the particular conduct charged was infected with moral turpitude to those decisions which hold that mere conviction of an attorney for this offense is evidence of conduct involving moral turpitude. This court has adopted the latter view. The court held in In re Burrus, supra, that an "• • • intentional failure to make returns as the law re-

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[6] Now Rule 4, DR 1-102, V.A.M.R.

quired constituted conduct involving moral turpitude within the meaning of both the statute, § 484.240 RSMo 1949, V.A.M.S., and our Rule 4.47." 258 S.W.2d at 627. In re Lurkins, 374 S.W.2d l. c. 68; In re McMullin, 370 S.W.2d l.c. 155. The question is well settled in this state and we are persuaded by our reexamination of the cases in other states that we should continue to maintain our present position.

Respondent should be disciplined. The limits to which that discipline should be extended have been given careful consideration. We are mindful that the purpose of these proceedings is not to punish, but rather to preserve the courts and the profession from the ministrations of those who, by their actions, degrade the administration of justice and demonstrate their unfitness to serve the courts as officers thereof. It is our judgment that an indefinite suspension will serve the ends of justice.

It is ordered that respondent be suspended indefinitely from the practice of law with leave to apply for reinstatement after expiration of eighteen months from the date of rendition of this decision upon a showing that he is a person of good moral character and fully qualified to be licensed as a member of the bar of Missouri.

All concur.

Fred L. Henley,
Judge

APPENDIX D

Revised Statutes Missouri, 1969

"484.190. Powers to Suspend or Remove.—Any attorney or counselor at law may be removed or suspended from practice in the courts of this state for any of the following reasons:

1. If he be convicted of any criminal offense involving moral turpitude;

2. If he unlawfully retain his client's money or if he is guilty of any malpractice, fraud, deceit or misdemeanor whatsoever in his professional capacity;

3. If he shall have been removed, suspended or disbarred from the practice of law in any other state or jurisdiction and shall fail to disclose such fact in his application for license to practice law in this state."

APPENDIX E

Missouri Supreme Court Rule

4.47

(From R.S. Mo. 1969, Vol. 5, p. 4322)

"4.47 **General Rule Governing Certain Conduct of Lawyers.** A lawyer should always maintain his integrity; and shall not willfully commit any act against the interest of the public; nor shall he violate his duty to the courts or his clients; nor shall he, by any misconduct, commit any offense against the laws of Missouri or the United States of America, which amounts to a crime involving acts done by him contrary to justice, honesty, modesty or good morals; nor shall he be guilty of any other misconduct whereby, for the protection of the public and those charged with the administration of justice, he should no longer be entrusted with the duties and responsibilities belonging to the office of an attorney."